

No. 75-700

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, ET AL., PETITIONERS,

v.

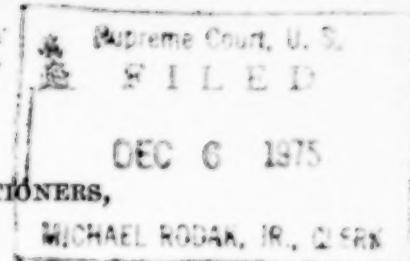
JOHN L. BEATTIE, JR.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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The Government has filed a petition for a writ of certiorari from that portion of the decision of the Court of Appeals for the Second Circuit which modifies the enforcement order of the District Court insofar as the summons requests copies of communications between the taxpayer and his accountant.

But in stating the "Question Presented" (Government petition p. 2), the Government assumes facts which are not in the record and which are indeed contrary to those in the record.

The Government acknowledges that:

"Correspondence between the taxpayer and his accountant might well qualify for the privilege under Boyd v. United States, 116 U.S. 616, if sought from the taxpayer's own files. In those circumstances, the original letters from the accountant to the taxpayer and copies of letters from the taxpayer to the accountant would be part of the taxpayer's private papers." (Government Petition, p. 7).

Accordingly, the Government apparently objects only to that portion of the decision of the Court below which declines to require production of "original letters from the taxpayer to his accountant and copies of letters from the accountant to the taxpayer." (Government Petition, p. 7).

We submit that the Government's petition should be denied because (1) it is without merit, and (2) the question presented is not ripe for adjudication by this Court.

1. The Government's petition is without merit. The opinion of the Court below holds that an accused may assert the Fifth Amendment privilege with respect to copies of letters written by him and letters written to him in response, if in his possession; for both would be equally within the protected "private inner sanctum." (App. B, 32a, 33a;

appendix references are to the appendix annexed to the Government's petition for a writ of certiorari). The letters which the Government claims are outside the privilege are precisely the same letters as those which it acknowledges are within the privilege, although they may be originals in some cases and copies in others. Surely, to borrow a phrase from the opinion of Judge Friendly in the Court below, "It would indeed be a crabbed reading of the privilege" (App. B, 32a) to hold that whether letters in the taxpayer's possession are within the protected "private inner sanctum" turns on whether they are originals or copies. Rather, it is their private and personal nature, the information which they may contain, and the "ingredient of personal compulsion against an accused" 1/ which give rise to the privilege.

2. The question presented is not ripe for review by this Court. Although the summons refers to "original workpapers," including "correspondence" (App. B., 4a), there is no basis for the Government's assertion in its "Question Presented" that the taxpayer "arranged for the accountant to turn over his correspondence file to him." (Government Petition, p. 2).

1/ Couch v. United States, 409 U.S. 322, 329.

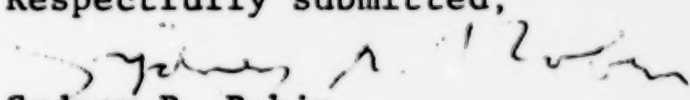
Nowhere in the record is there any reference whatever to the taxpayer's having arranged for the accountant to turn over his correspondence file, or indeed to the existence of a correspondence file. On the contrary, the accountant's affidavit refers only to the delivery of "certain workpapers" which he had prepared for the taxpayer and his business. (App. B, 5a, 6a; R. 16 ["R" refers to record appendix filed in Court of Appeals]). And the taxpayer's affidavit acknowledges the delivery to him only of "various workpapers, trial balances, and schedules" which the accountant had prepared for him. (App. B, 5a; R.14).

It is open to the Government, in subsequent proceedings, to examine the accountant to determine whether there is correspondence between the taxpayer and him; and, if so, in whose possession it is and was at the time the summons was served. Unless and until it does so, and thereby lays the factual basis for the question which it would have this Court determine, we respectfully submit that the question is not ripe for review.

For the foregoing reasons, we respectfully submit that the Government's petition for a writ of certiorari should be denied. If the Court nevertheless sees fit to grant the petition, we submit that the taxpayer's petition should likewise be granted and that all issues in

the case should be heard and decided, and not held pending disposition of this Court's decisions in the Kasmir and Fisher cases (Nos. 74-611 and 74-18). (See taxpayer's Reply Brief to Government Memorandum of even date herewith).

Respectfully submitted,


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